THE TREATY-MAKING POWER: A REJOINDER

BY EDWARD S. CORWIN

In his article in the April North American Review [1] Mr. Henry St. George Tucker argues that the reserved powers of the States limit the treaty-making power of the United States. In the following article the contrary view will be presented.

Mr. Tucker admits that it may be inconvenient "to permit the people of one State . . . by its independent and antagonistic action to defeat a treaty whose beneficent effects are intended to reach all the people of the United States," but he contends that "the argument *ab inconvenienti* . . . cannot be admitted in the consideration of constitutional rights." Unfortunately, he soon forgets this equally correct and sensible principle, for he contends with great urgency that if the view combated by him be correct, "the negro from Hayti or the Congo may under a treaty be free to enter the schools of Texas and ride in any coach on a railroad that may suit his tastes, notwithstanding the law of Texas to the contrary"; and he inquires, with considerable indignation, whether American citizenship is "to be a badge of inferiority and the alien to be preferred to the native-born American." No doubt we incur grave risks in maintaining a National Government at all. For with its powers to regulate commerce and to tax, Congress has trade, business, and private incomes pretty much at its mercy; with their powers of appointment the President and Senate can fill all of the offices with rogues; with his powers in the conduct of foreign relations the President can bring on that worst of calamities, a foreign war, for any sort of cause. But then we recall that the States themselves originally possessed some of these powers and used them to so little advantage that the people transferred them to the

[1] "The Treaty-Making Power Under the Constitution of the United States."

central Government. Very likely they should have abolished them outright.

Turning, then, to the question at issue, we find that Mr. Tucker bases his argument upon some words from Story and Cooley, upon the admitted fact that the treaty-making power is a constitutionally limited power, upon one or two judicial utterances, and upon his reading of the Tenth Amendment and Article VI., Paragraph 2, of the Constitution.

The words from Cooley sustain Mr. Tucker's position, but as Cooley cites in their support the same words of Story that Mr. Tucker does, the question before us is whether Story's words have been properly used. These are as follows: "But though the power [of making treaties] is thus general and unrestricted, it is not to be so construed as to destroy *the fundamental laws of the State.*" These words Mr. Tucker quotes four times, but on the last two occasions he introduces an interesting variation by making the word "State" plural! For this proceeding there is no warrant. Story in the passage quoted uses the word "State" in the generic sense and means by it the *United States.* This is shown, first, by his capitalization of it, whereas he always puts the States of the Union in the lower case. It is shown, secondly, by the words that immediately follow the ones quoted: "A power given by the Constitution cannot be construed to authorize a destruction of other powers *given* in the same instrument." If the powers of the States are *given* them by the Constitution, what becomes of their *reserved* rights? But it is shown finally by his words on the precise point under discussion: "The peace of the nation and its good faith and moral dignity indispensably require that *all* State laws shall be subject to the supremacy of treaties with foreign nations." (Section 1838.)

But the ultimate authority, that upon which commentators and courts must alike rest, is, of course, that of the Constitution. The Tenth Amendment to the Constitution reads:

> The powers not delegated to the United States by this Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.

These words, by Mr. Tucker's own presentation of the case, do not advance the discussion much, since the treaty-

making power *is* delegated to the United States, wherefore the crucial question still demands answer, as to what happens when that power is so exercised as to conflict with the exercise by a State of one of its reserved powers. The really pertinent passage of the Constitution is therefore Article VI., Paragraph 2, which reads thus:

> This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, *anything in the constitution or laws of any State to the contrary notwithstanding.*

It would be tolerably difficult, I surmise, to select words conveying more clearly the idea that State power cannot limit national power. *For if the States possess a power, they may exercise it by enacting statutes or constitutions.* But it is here declared that *any* such statute or constitution, or part thereof, conflicting with a treaty made under the authority of the United States must fall to the ground; and how "the authority of the United States" is to be deemed limited by that over which it is pronounced invariably supreme is certainly more than the mind untutored in the dialectics of the State Rights school can easily fathom.

But Mr. Tucker points out, what indeed is universally admitted, that the "authority of the United States" by virtue of which treaties are made is not an unlimited authority; that, for example, it does not constrain Congress to vote money to carry out a treaty; and he contends that "supremacy admits of no limitations, exceptions, or conditions." Very true, but the question still remains, Supremacy of *what* over *what?* And the answer is, Supremacy of treaties made by the authority of the United States, which is the authority established, created, and defined by the Constitution, over *all* conflicting State laws and constitutional provisions; and the similar supremacy of all acts of Congress made in pursuance of the Constitution.

However, not desiring to make Article VI. mere empty verbiage, Mr. Tucker introduces a distinction. It is entirely apparent that Article VI. owes its existence directly to the recognition by the framers of the Constitution that the States would continue to possess large and undefined powers of legislation which would probably be exercised in the future, as they had been in the past, to the derogation of national power. But Mr. Tucker would have us

believe that the only kind of State laws against which the framers intended to safeguard national power were the laws which the States would pass by virtue of what he calls their "concurrent powers." Let us examine this contention.

Mr. Tucker defines "concurrent powers" as "powers which the Federal and State governments each employ." The definition is imperfect. More accurately speaking, concurrent powers are those which the States may exercise within the field of power assigned by the Constitution to the National Government *in the absence of conflicting national legislation.* Actually, the idea has been of little importance in constitutional law save in connection with State legislation *directly* regulating foreign or interstate commerce; and in this connection it did not obtain legal standing till 1851, in the famous case of Cooley *vs.* The Board of Wardens (12 How. 299), where, however, it is used, not in contradistinction to what Mr. Tucker calls "the reserved powers of the States," but to those branches of commercial regulation which are closed to the States by the mere grant of power to Congress. Moreover, the Court there declares explicitly that these powers belong to the States, not by virtue of any delegation of power from the National Government, but of original right—that is, that they stand on the same footing with all other State powers. And to-day the term has substantially disappeared from the vocabulary of the Court, which regards all State legislation as enacted by virtue of the same power, to wit, "the police power." But suppose we admit what is apparently Mr. Tucker's view, that these powers are different from the States' reserved or police powers, in that they owe their existence not to the States' autonomy, but to the allowance of the National Government. Then indeed is Article VI., Paragraph 2, superfluous, since obviously this allowance may be withdrawn at any moment. Finally, Article VI. knows nothing of this distinction: it says "*anything* in the constitution or laws of *any* State to the contrary notwithstanding."

But, lastly, Mr. Tucker makes his case concrete by citing a power which undoubtedly is one of the reserved powers of the States, in the strictest sense of the term, and which accordingly, if his contention is correct, cannot be invaded by the treaty power. Thus he quotes the language of Justice Field in United States *vs.* Fox (94 U. S. 320):

The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition of it may be exercised by its owner, is undoubted.

And again the language of Justice Washington in McCormick *vs.* Sullivant (10 Wheat. 202):

The title and modes of disposition of real property within the States, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority.

At the close of his paper, furthermore, Mr. Tucker in a note "confidently asserts that no case has been decided by the Supreme Court involving the direct question herein discussed"—that is, the competence of the treaty-making power to invade the field of State rights. Let us see whether this confidence is well founded.

The same judges, with one exception, who decided the McCormick case also decided Chirac *vs.* Chirac (2 Wheat. 259, 1817); the same judges, with one exception, who decided United States *vs.* Fox also decided Hauenstein *vs.* Lynham (100 U. S. 483, 1879); and the judge who wrote the opinion in the United States *vs.* Fox again spoke for the Court in Geofroy *vs.* Riggs (133 U. S. 258, 1890). In each of these three cases the issue was the same; it lay between claimants to real estate whose right to the property involved was admitted to be perfect under the local law and other claimants who asserted the right to claim the same property *as heirs* to it upon the basis of certain treaty provisions.[1] In each case the decision of the United States Supreme Court, given unanimously, was in favor of the latter claimants; and the basis of the decision was in each case announced to be Article VI., Paragraph 2. Later, reviewing these and similar decisions, Attorney-General Griggs stated the rule that they unmistakably establish:

The fact that a treaty provision annuls and supersedes the law of a particular State upon the same subject is no objection to the validity of the treaty. (22 Opinions 214.)

Mr. Tucker's "confident assertion" just quoted is therefore plainly without merit; as is also his further assertion that

All of the cases have decided questions collateral with the real issue involved in this [his] paper.

[1] The local law in Geofroy *vs.* Riggs was that of the District of Columbia, but it was ruled that the term "State" of the treaty applied also to the District.

Nor, had he turned from judicial decision to the practice of the treaty-making body, would he have found better support for his general thesis. The United States has since 1789 entered into dozens of treaties of amity and commerce, extradition treaties, and Consular Conventions, every one of which has to a greater or less extent invaded the field normally occupied by the States in the exercise of their reserved powers.[1] This subject naturally cannot be entered upon at length in a short article, but one treaty I will make specific reference to. This is the Convention of 1800 with France, which, in the language of the Supreme Court of the United States, gave citizens of France "the right to purchase and hold land in the United States"—in contravention of the common law rule, then prevalent in every State in the Union—"removed the incapacity of alienage, and placed them in precisely the same situation as if they had been citizens of this country." This indeed, to quote Attorney-General Cushing, is "the most expressive of all precedents, it having passed through the hands and received the approbation of John Adams, John Marshall, Oliver Ellsworth, Thomas Jefferson, and James Madison, who, if anybody, should have understood the Constitution."

On the precise question, therefore, of the relation of the treaty-making power to the reserved rights of the States, our conclusion must be that the latter do not limit the former to any extent; that, in other words, *the United States has exactly the same range of power in making treaties that it would have if the States did not exist.* Further, it should be pointed out that the same rule of construction also applies to the powers of Congress, though those powers occupy only a portion of the field of legislative power.

The Convention of 1787 desired nothing so much as to get rid of that State intervention which had wrecked the Articles of Confederation. This it accomplished in three ways: by providing the National Government with executive machinery of its own; by making the Supreme Court the final interpreter of the Constitution; by providing for the supremacy in all cases of the national authority, as defined by the Constitution, over conflicting State authority. The point of view of the Convention was voiced by Wilson thus:

> With respect to the province and object of the general government they [the States] should be considered as having no existence.

[1] National Supremacy, Treaty Power *vs.* State Power, by the writer.

Later a motion was offered in the Convention prohibiting the National Government "to interfere with the government of the individual States in any matters of internal police which respects the government of such State only and wherein the general welfare of the United States is not concerned." Despite the careful language in which it was couched, the motion was voted down by eight States to two.[1]

The view that the reserved powers of the States comprised an independent limitation on national power probably first found expression in the debate on Hamilton's Bank Project of 1791. Opposed as he was to the bank, Madison pronounced the argument fallacious. "*Interference with the powers of the States,*" said he, "*was no constitutional criterion of the power of Congress.* If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws or even the constitutions of the States."[2] Nevertheless, a generation later the same notion was again afoot, though now in a modified form. "It has been contended," recites Chief-Justice Marshall in his opinion in Gibbons *vs.* Ogden (9 Wheat. 1, 1824), "that if a law passed by a State *in the exercise of its acknowledged sovereignty* comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal and opposing powers." In other words, it was not claimed on this occasion that the National Government was under constitutional obligation not to invade the field occupied by the reserved powers of the States, but that whenever it did so the States could use their reserved powers to block it. "But," the Chief Justice answered: "The framers of our Constitution foresaw this state of things and provided for it." Whenever the Federal Government has acted in the exercise of powers intrusted to it, "in every such case the act of Congress or the treaty is supreme, and the laws of the State, *though enacted in the exercise of powers not controverted,* must yield to it."

The thing that really gave the doctrine urged by Mr. Tucker the slight standing that it has at isolated points obtained in our constitutional law was the spread of the dissolving theories of the "Great Nullifier," a circumstance which serves to bring out what had probably already become

[1] The scope and import of Article VI., Paragraph 2, were well understood by the opponents of the Constitution. See *Federalist,* 44 and 64.

[2] See Annals of Congress, Vol. II., Col. 1891, ff.

evident to the reader, that Mr. Tucker's doctrine is only a special form of the doctrine of nullification. The actual task of nullifying national authority is, so to speak, farmed out with the Supreme Court of the United States, but the supposed legal basis for doing this—namely, the vast, undefined, legislative powers of the States—remains the same. In the last analysis the doctrine is self-contradictory, since the right of the Supreme Court itself in taking appeals of constitutional cases originating in the State courts is a clear invasion of the reserved rights of the States.[1] Fortunately, therefore, not only for the treaty-making power and the powers of Congress, but for its own power as well, the Supreme Court has to-day returned to first principles. Of this such decisions as those in Henderson *vs.* New York (92 U. S. 279, 1875), Minnesota *vs.* Barber (136 U. S. 313, 1890), *in re* Rahrer (142 U. S. 545, 1891), the recent Employer's Liability Cases (Mondou *vs.* N. Y., N. H. & Hart. R. R. Co. 223 U. S.), the Minnesota Rate Cases (230 U. S.), and Hoke *vs.* United States (227 U. S.) furnish proof positive, to say nothing of a host of dicta.

Thus in the Employer's Liability cases, the Court was confronted with the now notorious decision of Chief Justice Baldwin of the Connecticut Supreme Court in the Hoxie case, in which enforcement had been refused the act of Congress on the ground of its disharmony with "the policy of the State." Strangely unaware as the Connecticut Court showed itself to be of the established canons of constitutional law, its view must, after all, be admitted to have been the inevitable one if the reserved powers of the States limit national power. But the Supreme Court of the United States no longer subscribes to this doctrine. The theory of the Connecticut Court was accordingly swept aside, in the following language taken from the National Court's earlier opinion in Smith *vs.* Alabama (124 U. S. 508, 1888):

> The grant of power to Congress to regulate commerce . . . is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, *although in pursuance of an acknowledged power reserved to it,* which conflicts with the actual exercise of the power of Congress over the subject of commerce must give way before the supremacy of the national authority.

And not less significant is Hoke *vs.* United States, in which the Court upheld the Mann Act forbidding the taking

[1] See Hunter *vs.* Martin, 4 Munf. (Va.), 1.

of women from one State to another for immoral purposes. The opponents of the act contended that, inasmuch as its obvious purpose was not to safeguard commerce, but the public morals, it represented an attempt by Congress to usurp the powers of the States. But the Court held unanimously that Congress, no less than the State legislatures, may exercise its constitutional powers for all the large recognized ends of government; that, in other words, though the *powers* of government are apportioned among us, *its objectives* are not. The decision expels the theory of indefeasible State rights from its last angle.

To conclude: The reserved powers of the States comprise, loosely speaking, the sum total of governmental powers after the powers granted the National Government by the Constitution are counted out. The National Government may use *only* the powers thus granted it and, as the Tenth Amendment makes clear, has no "inherent powers." But in using its granted powers, which it may do for all legitimate purposes of government, it often brings under its control subject-matter that also falls to the control of the States in the exercise of their reserved powers. In *all* conflicts of authority thus resulting the States must give way because of the provisions of Article VI., Paragraph 2, which, when it is not read "under the prepossession of some abstract theory of the relation between the State and the National governments" (Justice Bradley in *ex parte* Siebold 100 U. S. 371, 1879), is perfectly explicit. In short, though national power is limited power, the reserved powers of the States do not furnish one of the limitations.

EDWARD S. CORWIN.